SHAUKAT LLIASU SDN. BHD.

v.

PENTADBIR TANAH DAERAH BARAT DAYA PULAU PINANG & ANOR.

HIGH COURT MALAYA, KUALA LUMPUR
LIM BENG CHOON J
[ORIGINATING MOTION NO. S7-21-460-89]
14 JANUARY 1992

LAND LAW: *Foreclosure proceedings - Sold by public auction to recover outstanding loan 2 legal charges - Service of 2 statutory notice on defendants whether bad in law - Discrepancy as to amount owing as shown in statutory notice and affidavit filed in Court - Repayment made after service of statutory notice - Repayment shown in affidavit but not shown in notice - Whether statutory notice defective - Variation of interest rate - Whether prior notice required to be served on defendants - Legal expenses - Charged land - Whether plaintiff could claim legal fee in application for sale - 2nd plaintiffs claim also includes for "costs of and incidental to this application" which included solicitors fees - 2nd plaintiffs not entitled to claim for 'legal fee' in charge action - Objection by deficiency for foreclosure proceedings.*

The plaintiff appealed to the High Court against the order of the Pentadbir Tanah Daerah, made at a purported enquiry held on the grounds that there is no power to hold two enquiries on the same land and that the Form 16D was served on the wrong party. Further a cause to the contrary had been shown by the appellant and that the Land Administrator had failed to consider the caveats including the Registrar's caveat and that the reserve price was below the market price of the property. The plaintiff also stated that wrongful interest was charged and that the 2nd defendant had no capacity to be chargee.

Held:

[1] The first application of the chargee had terminated without a decision and in law an enquiry is bound to be held pursuant to any application.

[2] The plaintiffs because the chargor of the pursuant to s. 248(i) of the NLC and pursuant to s. 254(2) of the NLC a second statutory demand is not necessary.

[3] The appellant had failed to show that there was a cause to the contrary.

[4] The effect of a caveat is to prohibit the registration, endorsement or entry on the register but does not prohibit a chargee from getting an order of sale.

[5] The reserve price was properly fixed.

[6] The issue of penalty interest was never raised in the pleading and ought not to be considered.

[7] The 2nd defendants had capacity to be a chargee.

[Plaintiffs' application or appeal dismissed.]

Cases referred to:

Eu Finance v. Sim Sen Organisation Bhd. [1990] 2 MLJ 357 ***(cons)***
Farrel v. Secretary of State [1980] 1 All ER 166 ***(foll)***
Lee Ah Chor v. Southern Bank Bhd. [1991] 1 MLJ 428 ***(foll)***
Esso Petroleum Co. Ltd. v. Southport Corp. [1956] AC 218 ***(cit)***

Muniandy & Anor. v. Mohamad Abdul Kadir & Ors. [1959] 2 MLJ 446 ***(cit)***
Hadmer Productions v. Hamilton [1983] 1 AC 191 ***(cit)***
Bowmakers Ltd. v. Barnet Instruments Ltd. [1945] 1 KB 65 ***(cons)***

Legislation referred to:
Bank Kerjasama Rakyat Malaysia Bhd. (Special Provisions) Act 1978, s. 14(1)
Co-operative Societies Act 1948, s. 14(1)
National Land Code 1965, ss. 35, 244, 247, 248, 248(1), 254(2), 261, 263, 263(2)(b), 322(2)

For the plaintiffs - M.S. Murthi; M/s. Murthi & Partners
For the 1st defendant - Zainal Rashid
For the 2nd defendants - M. Chang; M/s. Suhaimi Khor Zulkifli & Chang

JUDGMENT

Lim Beng Choon J:

On 8 December 1989, the plaintiffs appealed to this Court against the order of the Pentadbir Tanah Daerah, Barat Daya, Pulau Pinang (the Pentadbir Tanah) made at the conclusion of the purported enquiry held under s. 261 of the National Land Code be set aside. The grounds of the appeal are as follows:

(1) that the District Land Administrator had no authority to hold 2 enquiries on the same land, one in July 1989 an the other in September 1989;

(2) that the Form 16D was served on the wrong party;

(3) that a cause to the contrary has been shown by the appellant;

(4) that the Land Administrator had failed to take into consideration the existence of numerous caveats including the Registrar's Caveat at the time of the enquiry;

(5) that the price fixed by the Registrar is far below the estimated market price of the property.

In the affidavit-in-support, the plaintiffs gave their version of the events that took place leading to the plaintiffs instituting this action. The land which is the subject matter of this action (the land) was originally owned by the plaintiffs. On 18 January 1984 the plaintiffs agreed to sell the land to Phow Tay Sin Development Sdn. Bhd. (PTS) who agreed to purchase for the purpose of developing the land into a housing project. In order to obtain funds to purchase the land and to develop the same, PTS charged the land to the 2nd defendants as security for a loan of RM6.4 million. However PTS failed to pay the purchase price or to develop the land. Numerous innocent purchasers' interest was gravely prejudiced and they made complaints to the Housing Ministry. To make matters worse, a winding-up petition was presented against PTS and the 2nd defendants had also served a notice of demand Form 16D under the National Land Code on PTS on 20 November 1986 as PTS had defaulted in the payment of the quarterly payment of interest. However PTS failed to respond to the said notice. In 1987 the plaintiffs instituted a civil suit against PTS and the 2nd defendants. As a result of the institution of the civil suit the plaintiffs with the consent of PTS obtained an order from the Court on 31 October 1987 to rescind the sale and purchase agreement relating to the land and the same was to be vested in the plaintiffs subject to the rights of the 2nd defendants in respect of the charges therein. Thereafter the plaintiffs were prepared to revive the development of the housing project and sought financial assistance from the 2nd defendants who initially promised to help them. In the result the plaintiffs made a formal application by letter dated 26 April 1988 for financial support. Unfortunately the 2nd defendants resiled from their original promise and wrote to the plaintiffs on 10 June 1988 stating that they were not prepared to give any financial support to the plaintiffs and

instead sent a notice of demand for repayment of the balance of the loan and interests left unpaid by PTS. Despite an appeal made by the plaintiffs, the 2nd defendants followed up with a notice of demand in Form 16D dated 24 December 1988. As the plaintiffs failed to respond, the 2nd defendants applied to the Pentadbir Tanah for an order of sale of the land. On 7 August 1989 the Pentadbir Tanah issued a summons for enquiry and the enquiry was held on 22 September 1989. At the enquiry the authorised representatives of the plaintiffs requested for particulars of the enquiry which had been held earlier and they were told by the Pentadbir Tanah that the enquiry held on 22 September 1989 was a fresh enquiry. Furthermore at the enquiry the representatives of the plaintiffs were not given a chance to explain the plaintiffs' case and the Pentadbir Tanah fixed the reserve price of the land to be sold by public auction in the sum of RM4.3 million without allowing the representatives of the plaintiffs to state their grounds in opposition to the reserve price when according to them the value of the property was within the region of RM6 million. The Pentadbir Tanah thereupon fixed 18 December 1989 for the carrying out of the auction of the land without taking into consideration the objection raised by the representatives of the plaintiffs that the date was less than 3 months from the date of enquiry. The Pentadbir Tanah also totally disregarded the existence of the private caveat and the Registrar's caveat lodged against the land which caveats would deter potential buyers from bidding as they would not be able to get a clean title.

The 2nd defendants gave their version of the events that took place in their affidavit-in-reply affirmed on 22 March 1990. They confirmed that they granted a loan of RM6.4 million to PTS who created a charge on the land comprising of Lots 293, 742, 488 and 457 of Mukim 11, Daerah Barat Daya, Pulau Pinang to secure repayment of the loan and interests on demand. The first legal charge was duly registered over Lots 742 and 293 of the land on 27 November 1984 and another first legal charge over Lots 457 and 488 was registered on 26 November 1984. At the time of executing the first legal charge, the 2nd defendants and/or their agents had no notice actual or constructive regarding the interests of the purchasers of some of the houses on the land as their interest was not registered. The 2nd defendants also asserted that a notice of default in Form 16D dated 18 February 1987 was properly served on PTS when that company defaulted in repayment of the quarterly interest. Upon the expiry of the aforesaid default notice and at the request of the 2nd defendants a land enquiry was conducted by the Pentadbir Tanah in respect of Lots 742 and 293 of the land on 5 November 1987. The said enquiry was adjourned to 6 January 1988 to enable Lots 457 and 488 of the land to be included in the same enquiry. On that date the land enquiry was again postponed as the land had been transferred to the plaintiffs by the order of the Court which I have referred to earlier. On 7 December 1988 PTS was wound up *vide* Petition No. 42-27-85. As the land was transferred to the plaintiffs as aforesaid, a notice of demand in Form 16D was served on the plaintiffs on 24 December 1988. Apparently the plaintiffs failed to respond to the said notice and there upon the 2nd defendants applied to the Pentadbir Tanah to hold an enquiry under s. 263 of the National Land Code. The enquiry was held on 22 September 1989 and the Pentadbir Tanah issued Borang 16A in which he ordered that the land be sold by public auction to be held on 18 December 1989 at the reserve price of RM4 300 000 and the total amount due and payable to the 2nd defendants was RM5 564 918.94. In the said affidavit-in-reply the 2nd defendants also alleged that:

(i) since the representatives of the plaintiffs protested only against the date of auction, it showed that the plaintiffs had accepted the order of the Pentadbir Tanah as proper and

(ii) the reserve price was based on the valuation report dated 27 May 1989 submitted by M/s. Jurunilai Bersekutu, a firm of registered valuers.

The 2nd defendants also denied giving any advice or promise to the plaintiffs concerning the grant of any loan to the plaintiffs. The auction fixed on 18 December 1989 had to be adjourned as a result of this application of the plaintiffs.

An affidavit-in-reply was also filed by the 1st defendant. The said affidavit was affirmed by one Basaruddin bin Sadali (Basaruddin) the Assistant District Land Administrator, Pejabat Pentadbir Tanah Daerah, Barat Daya, Pulau Pinang in March 1990. His version of the events that took place is substantially the same as that given by the 2nd defendants. I, therefore, need only to set out certain averments of Basaruddin which have not been stated in the affidavit-in-reply of the 2nd defendants. On 28 October 1987 his department received an application for an order for sale of the land. Pursuant to the said application his department caused an enquiry to be made held on 5 November 1987 and it was conducted by the then Penolong Pentadbir Tanah, one Shamsudin bin Zakaria (Shamsudin). The 2nd defendants, as chargees, were duly informed of the date and place of the enquiry and so was PTS. However the enquiry had to be adjourned on the ground that further investigation had to be conducted regarding the land. The enquiry was again heard on 6 January 1988 by Shamsudin but it was again postponed as the land had by then been vested on the plaintiffs by the Court order subject to the rights of the 2nd defendants and their charges over the land. In the meantime Shamsudin was transferred to Pejabat Tanah Seberang Perai Tengah on 16 March 1988 and one Zainal Abidin bin Che Omar (Zainal) took over the conduct of the enquiry. Zainal continued with the enquiry on 6 June and 11 July 1988. However no decision was made at the enquiry held on 11 July 1988 as the 2nd defendants' representatives asked for a postponement to try to settle the matter. The representatives of the plaintiffs who were present apparently raised no objection to the postponement. Basaruddin came into the picture when he assumed the post as Registrar Land Administrator of Pejabat Pentadbir Tanah Daerah Barat Daya, Pulau Pinang on 16 August 1988 to replace Zainal who was transferred to another portfolio within the department. On 15 March 1989 Basaruddin received a new application for an order of sale of the land in Form 16G submitted by the 2nd defendants. Pursuant to the application Basaruddin caused a fresh enquiry to be held in accordance with s. 261 and s. 35 of the National Land Code. He did so on the ground that as the previous Pentadbir Tanah who caused the earlier enquiries to be held had been transferred out & assumed new posts they therefore lacked jurisdiction to continue conducting any enquiry under s. 261. The enquiry was held on 22 September 1989 and Basaruddin explained his reason for holding a fresh enquiry to the representatives of the 2nd defendants and also the two representatives of the plaintiffs namely Haji P. Shaukat Ali bin Ghani and Ismail bin Abu Bakar who were present at the enquiry. All the parties present accepted the decision of Basaruddin and agreed that in the circumstances of the case a fresh enquiry should be held. Basaruddin went on to assert that the allegation of Hj. P. Shaukat Ali made in his affidavit in support about the representatives of the plaintiffs being denied an opportunity to present the plaintiffs' case was not true. On the contrary the said representatives were given every opportunity to raise any objection and to say what they wanted to say. A copy of the notes of evidence of the enquiry was produced and annexed as Exh.'BBS7' to Basaruddin's affidavit-in-reply. From Exh.'BBS7' it can be seen that Hj. P. Shaukat Ali had been given an opportunity to be heard. With regard to the fixing of the reserve price it was asserted that the plaintiffs' representatives did not suggest any reserve price. In any event fixing the reserve price at RM4.3 million Basaruddin based it on the valuation report formulated by the registered valuers. In fixing the date of auction he referred to s. 263(2)(b) of the National Land Code which provides that the date on which the sale to be held should not be less than one month after the date on which the order is made. Finally it was asserted that the existence of caveats over the land would not prohibit the Land Administrator from issuing an order for sale of the land.

Basaruddin on behalf of the 1st defendant filed in a supplementary affidavit affirmed by him on 17 July 1990 in which he asserted *inter alia* that the enquiry presided by Zainal on 6 June 1988 was adjourned at the request of Hj. P. Shaukat Ali as he asked that a notice of demand should be sent to him as he was then and still is the new owner of the land.

It amazes me that Counsel for the plaintiffs in his written submission adopted a line of arguments which is completely different from the grounds relied on by the plaintiffs as stated in their originating motion. Counsel did not deal with any of the grounds but contended *inter alia* that the amount claimed by the 2nd defendants was erroneous and that the 2nd defendants as a registered co-operative society was in breach of s. 30(1) of the Co-operative Societies Act 1948. I shall deal with Counsel's submission presently.

Turning to the 1st ground relied on by the plaintiffs in support of his applications, it is to be noted that pursuant to an application of the 2nd defendants for an order of sale of the land (first application) made on 28 October 1987 the 1st defendant commenced to hold an enquiry. At that time PTS was the registered proprietor of the land who charged the sale to the 2nd defendants to secure a loan granted to PTS. The parties to this application of the 2nd defendants were the 2nd defendants as the applicant and PTS as the respondent. However by 31 October 1987 the plaintiffs succeeded in obtaining a Court order directing that the land be vested in the plaintiffs subject to the rights of the 2nd defendants in respect of their charges therein. By virtue of the order of the Court the plaintiffs took the land as owner thereof but subject to the charges on the land. In other words the plaintiffs stepped into the shoes of PTS as chargors of the land which was charged as security for the repayment of the loan and interest remained unpaid by PTS. Support for this proposition can be found in s. 248 of the National Land Code where it is provided that:

> 248(1) The provisions of ss. 244 to 247 and Chapters 3 to 5 shall apply both to charges created under this Act and to those created under the provisions of any previous land law.
>
> (2) References in any of the said provisions to the chargor or the chargee shall be construed in relation to any charge as **references to the person or body in whom the charged land or lease is for the time being vested** or, as the case may be, the person or body for the time being entitled to the benefit of the charge.
> (Emphasis supplied)

Under the circumstances PTS ceased to have any right or interest over the land and they also ceased to be liable to the 2nd defendants under the charge. Their rights and interests on the land and their liability under the charge had been judicially assigned so to speak to the plaintiffs. In the result the first application of the 2nd defendants made to the 1st defendant for an order for sale of the land naming PTS as the owner/chargor of the land could no longer be sustained particularly when the Pentadbir Tanah had never made any decision on the first application. The 2nd defendants therefore had to make a fresh application (the second application) to the 1st defendant for an order for sale of the land which they did on 15 March 1989. Pursuant to second application the 1st defendant was bound to hold an enquiry pursuant to s. 261(1) of the National Land Code. In any event a Land Administrator is empowered to re-hear an enquiry commenced and part heard by another Land Administrator should the latter conducting the enquiry earlier die or is unable through illness, transfer or any other cause to exercise his function - see s. 35 of the National Land Code. In the result I am convinced that the 1st ground relied by the plaintiffs has no merit at all because:

(i) it could not be said that the Pentadbir Tanah held two enquiries on the same land since the enquiry commenced by the Pentadbir Tanah to hear the first application of the 2nd defendants had in the natural course of events been terminated without any decision being made and

(ii) the Pentadbir Tanah was bound by law to hold an enquiry pursuant to the second application of the 2nd defendants made on 15 March 1989.

Concerning the 2nd ground, the short answer is that by virtue of the vesting order of the Court, the plaintiffs become the chargors of the land pursuant to s. 248(i) of the National Land Code. Furthermore as stated in the supplementary affidavit-in-reply of Basaruddin it was the plaintiffs who requested that the statutory notice of demand be served on them. In any event when PTS was the owner/chargor of the land prior to the vesting order they had already been served with the statutory notice of demand and in such a situation and pursuant to s. 254(2) of the National Land Code a second statutory notice of demand is not required to be served on the person or body on whom the charged land is subsequently vested. The 2nd ground of the plaintiffs is likewise deprived of any merit particularly when both PTS and the plaintiffs had been served with the said statutory notice.

As to the 3rd ground, the assertions made in the affidavit-in-support of the plaintiffs' case are not to my mind sufficient to sustain their claim that "a cause to the contrary" has been established at the enquiry held by the Pentadbir Tanah pursuant to s. 263(1) of the National Land Code. As can be seen in the copy of the notes of evidence of the enquiry (Exh.'BBS7') annexed to 1st defendants' affidavit-in-reply the only matter raised by the representative of the plaintiffs was that he had written a letter to the 2nd defendants to request for a sum of RM1 million odd in order to carry on the housing project and according to him the 2nd defendants at first orally agreed but later resiled and by letter rejected the request of the plaintiffs. Despite several written appeals made to the 2nd defendants, they still refused to accede to the request of the plaintiffs and instead served them with the statutory notice of demand. What was said by the representative of the plaintiffs at the enquiry was inconsistent with the averment made in the affidavit-in-support of the plaintiffs' application. In that affidavit at paragraph 10 it was said that "on the advice of the 2nd defendant (bank), we forwarded a letter explaining the need for financial support **which had promised earlier by the bank**". A copy of the letter referred to was exhibited as Exh.HPS3. Upon a careful reading of the said letter there was no mention at all about the 2nd defendants having had earlier promised to give the plaintiffs any financial support. The absence of any evidence about the 2nd defendants' promise to give financial support to the plaintiffs goes only to augment the 2nd defendants' averment in their affidavit-in-reply that they had never promised to give any financial support to the plaintiffs. Another matter worthy of consideration is the plaintiffs' allegation that their representative was never given an opportunity to be heard at the enquiry held by the Pentadbir Tanah. This allegation has been militated by the contents of the notes of evidence of the enquiry which clearly shows that the plaintiffs' representative had his say.

Now to the 4th ground. In considering this contention it is appropriate to bear in mind the effect of the lodging of a caveat be it a Registrar's caveat or a private caveat against the land. The effect is set out in s. 319(1)(b) in respect of a Registrar's caveat and in s. 322(2) in respect of a private caveat of the National Land Code. The effect as stated in s. 322(2) applies equally well to effect of a Registrar's caveat and it reads as follows:

> 322(2). The effect of any private caveat expressed to bind the land itself shall, subject to sub-sections (4) and (5), be to prohibit so long as it continues in force the registration, endorsement or entry on the register document of title thereto of:
>
> (a) any instrument of dealing executed by or on behalf of the proprietor thereof, and any certificate of sale relating thereto;
>
> (b) any claim to the benefit of any tenancy exempt from registration granted by the said proprietor; and

(c) any lien-holder's caveat in respect thereof.

From these two sections it can clearly be seen that the effect of a caveat is to prohibit only the **registration**, **endorsement or entry on the register** document of title of any of the transactions and claim specified therein. It does not prohibit a chargee from getting an order for sale of the charged land by public auction (or for that matter preventing a registered proprietor to enter into a private sale and purchase agreement in respect of the land). Furthermore there is no express provision in Part 16 entitled Charges and Liens of the National Land Code to prohibit the sale by public auction of land on which a caveat has been lodged. Indeed had there been such a prohibition it would only encourage unscrupulous chargor who was unable to make repayment to the loan granted to him to enter into a bogus sale and purchase agreement in respect of the charged land to a third party where upon the latter could then lodge a caveat on the land thereby preventing a chargee from exercising his right to apply to the Court for an order for sale of the charged land. The plaintiffs therefore cannot now complain that because of the caveats the land would not be able to be sold at a higher price. I therefore cannot accept the 4th ground raised by the plaintiffs.

Turning to the 5th and final ground, it is to be noted at the reserve price was fixed by the 1st defendant after due consideration of a valuation report dated 27 May l989 by a firm of registered valuers. The said report is quite comprehensive and the valuers had given the basis of valuation of the sale value of the land. I am satisfied that the 1st defendant has every right to consider the said report as the valuers had taken into consideration almost all matters which an experienced and qualified valuer should take into account (see *Eu Finance Bhd. v. Sim Sen Organisation Bhd.* [1990] 2 MLJ 357.) Furthermore the plaintiffs' representative had never suggested what the reserve price should be or raised any objection against the said valuation report at the enquiry held by the Pentadbir Tanah. Again the 5th ground of the plaintiffs is rejected.

By reason of the discussions aforesaid I could have dismissed the plaintiffs application made by this originating motion. However as I have said earlier Counsel for the plaintiffs had in his written submission adopted a line of arguments which was completely different in that he had entirely omitted to deal with the 5 grounds relied by the plaintiffs. Instead he raised certain issues not mentioned at all in the originating motion or in the supporting affidavit of the plaintiffs. However to ensure that all issues raised in the present case have been considered by me I shall nevertheless deal with the issues raised by Counsel for the plaintiffs.

The first issue raised by Counsel for the plaintiffs was that the 2nd defendants were not entitled to impose penalty interest at the rate of 17% per annum and by reason thereof the statutory notice of demand Form 16D was defective and the order for sale granted by the Pentadbir Tanah must also be null and void. The answer to this issue is two-fold. Firstly this issue was not a ground relied on by the plaintiffs in this originating summons, neither was this issue specifically raised in their affidavit in support (encl. 2). It is trite law that the parties in a civil suit are bound by the pleadings and that they are precluded from raising any issue which has not been mentioned in the pleadings. This rule of law is well illustrated by Lord Edmund-Davies in the case of *Farrel v. Secretary of State* [1980] 1 All ER 166 at p. 173 where it has been said:

> It has become fashionable in these days to attach decreasing importance to pleadings, and it is beyond doubt that there have been times when an insistence on complete compliance with their technicalities put justice at risk, and, indeed, may on occasion have led to its being defeated. But pleadings continue to play an essential part in civil actions, and although there has been since the Civil Procedure Act 1833 a wide power to permit amendments,

> circumstances may arise when the grant of permission would work injustice or, at least, necessitate an adjournment which may prove particularly unfortunate in trials with a jury. To shrug off a criticism as 'a mere pleading point' is therefore bad law and bad practice. For the primary purpose of pleadings remains, and it can still prove of vital importance. That purpose is to define the issues and thereby to inform the parties in advance of the case they have to meet and so enable them to take steps to deal with it.

The rule laid down in the *Farrel* case has been cited with approval by our Supreme Court in *Lee Ah Chor v. Southern Bank Bhd.* [1991] 1 MLJ 428 at p. 431 and Jemuri Serjan SCJ who delivered the unanimous judgment of the Supreme Court went on to say at the same page:

> It does not seem necessary for us to emphasize and repeat the importance of pleadings in a civil suit castigating observations on which had been made from time to time in many cases in our Courts. It is only a question of whether Counsel, either because of negligence, inadvertence or call it what you will, choose to pay them scant or no need at all and we must say that they do so at their peril. Recently, lapses in the strict compliance with the rules of pleadings occurred in our Courts with marked frequency and we do not see how such lapses in the Courts should be tolerated at the expense of the clients.

The said rule can also be found in many more authorities see for instance *Esso Petroleum Co. Ltd. v. Southport Corp*.[1956] AC 218, *Muniandy & Anor. v. Mohamad Abdul Kadir & Ors.* [1959] 2 MLJ 446, *Hadmer Production. Hamilton* [1983] 1 AC 191, all of which have been cited by our Supreme Court in the *Lee Ah Chor* case.

Secondly it is all the more perplexing that if this issue was regarded as vital and decisive for the case of the plaintiffs, it was conspicuously omitted to be mentioned as one of the grounds relied on by the plaintiffs and neither was it in the affidavit-in-support (enclosure 2). Likewise it was clear that the said issue was never raised by the plaintiffs at the enquiry held by the Pentadbir Tanah. For the above reasons I am satisfied that Counsel for the plaintiffs is precluded from raising the first issue in his submission.

The second issue raised by the Counsel for the plaintiffs was that the 2nd defendants have acted *ultra vires* s. 30(1) of the Co-operative Societies Act 1948 which were a body registered under the said Act could only give loans to:

(a) its members

(b) its employees

(c) its subsidiaries

(d) to any other registered society.

As PTS, the purchaser of the land charged to the 2nd defendants was not a co-operative society nor was it a member of the 2nd defendants the loan given to PTS being in contravention of the said s. 30(1) is irrecoverable. Likewise this issue was never pleaded nor was it raised at the enquiry held by the Pentadbir Tanah. In the result Counsel for the plaintiffs is again precluded from raising this issue in his submission. In arriving at this conclusion I am not unmindful of the rule that in a case where a plaintiff says that the contract executed by him is prohibited by law and therefore illegal he is not precluded from challenging the illegality notwithstanding the fact that the issue of illegality has not been pleaded see *Bowmakers Ltd v. Barnet Instruments Ltd.* [1945] 1 KB 65, Based on this rule, I cannot preclude Counsel from raising the issue if what he submitted was right. However as pointed out to me by Counsel for the 2nd defendants s. 30(1) of the said Act was amended by the Bank Kerjasama Rakyat Malaysia Bhd. (Special Provisions) Act 1978 gazetted on 9 February

1978. Section 14(1) of the amending Act removes the restrictions as set out in s. 30(1) of the parent Act by providing that a co-operative society can give loans to and to stand guarantee for any loans to any person, member or non-member.

In the present case the loan was granted to PTS on 7 July 1984 and PTS registered the charges on the land as security for the repayment of the loan on 26 November 1984 and 27 November 1984 respectively. Consequently by virtue of s. 14(1) of the amending Act s. 30(1) of the parent Act prior to the amendment is no longer applicable to the loan and the charges, in the present case. There is therefore no merit in the contention of the plaintiffs.

I therefore dismissed the application of the plaintiffs made by way of this originating motion with costs.

Also found at [1992] 2 CLJ 877